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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 902

HECLA MINING COMPANY, a corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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No.

HECLA MINING COMPANY, a corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Hecla Mining Company, appellee below, hereby petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, to review its decision entered November 14, 1961, rehearing of which was denied, with opinion, on January 31, 1962.

DECISION BELOW

The opinions of the Court of Appeals, both on decision and on petition for rehearing, are set forth in the Ap-

pendix. They are not yet officially reported but the original opinion is unofficially reported in 61-2 U.S.T.C. par. 9766 (CCH) and in 8 A.F.T.R. 2d 5784 (P-H). The opinion on rehearing has not been reported.

The opinion of the District Court is set forth in the printed record. (R. 25-26.) It has not been reported either officially or unofficially.

JURISDICTIONAL STATEMENT

The decision below was rendered November 14, 1961 and was entered on the same day. A petition for rehearing was filed on December 6, 1961, and was denied with an opinion on January 31, 1962. A motion for leave to file a second petition for rehearing was filed on February 21, 1962, and was denied on March 15, 1962.

Jurisdiction is conferred on this Court to review the decision below by 62 Statutes at Large 928 (United States Code, Title 28, Sec. 1254).

QUESTIONS PRESENTED

1. Is the unanimous decision of this Court in *American Propeller Co. v. United States*, 300 U.S. 475, 57 S. Ct. 521, 81 L. Ed. 751 (1937), still a valid precedent, binding on the lower federal courts?

2. Have *Bulova Watch Co. v. United States*, 365 U.S. 753, 81 S. Ct. 864, 6 L. Ed. 2d 72 (1961), and *Manning v. Seeley Tube & Box Co.*, 338 U.S. 561, 70 S. Ct. 386, 94 L. Ed. 346 (1950), overruled sub silentio the earlier

unanimous decision of this Court in *American Propeller Co. v. United States*, 300 U.S. 475, 57 S.Ct. 521, 81 L. Ed. 751 (1937)?

3. Is the principle that interest will not run on an interest-bearing debt where that debt is offset by a non-interest-bearing claim a one-way doctrine, available to the Government but not to the taxpayer?

4. Is the effect of a statute phrased in general terms limited to the particular situation which caused Congress to adopt it, or is the statute to be given effect generally within the scope suggested by its language?

STATUTORY PROVISIONS INVOLVED

Sections 292(a) and (c), Section 322(a) (1) and Section 3771(c) of the Internal Revenue Code of 1939 are the statutes involved. Because of their length they are set forth in the Appendix at pages i to iii, inclusive.

STATEMENT OF THE CASE

This case arose in the District Court for Idaho, where a complaint was filed on January 21, 1958, within two years of the date (January 24, 1956) the Commissioner of Internal Revenue denied petitioner's refund claim. The amount in dispute had been paid to the Commissioner on July 29, 1953, and the refund claim was filed on July 11, 1955. (R. 27.)

After trial on the merits, the District Court entered judgment for petitioner. (R. 34.) This judgment was

reversed on November 14, 1961, and petition for rehearing was denied with opinion on January 31, 1962. A second petition for rehearing was filed on February 21, 1962 and denied without opinion on March 15, 1962. (Appellate Record, unnumbered.)

Petitioner is a Washington corporation with its principal place of business in Wallace, Idaho. It filed its income and excess profits tax returns for the periods involved with the Collector of Internal Revenue for the District of Idaho. (R. 27.) On February 19, 1946, petitioner filed a claim for refund of 1942 excess profits taxes in the amount of $133,376.97, on the ground that certain receipts were not subject to the excess profits tax. On July 28, 1949, within the period of limitations, this claim was amended to state the new ground that petitioner was entitled to a carryback to 1942 of unused excess profits credits from 1943 and 1944. (R. 27-28.)

A few days before the claim was amended, namely on July 18, 1949, the Internal Revenue agent who had been auditing petitioner's returns completed his audit, finding income tax deficiencies for each of the years 1942-1945, inclusive, and an overpayment of $276,362.86 excess profits tax for 1942. The net effect of the adjustments was a deficiency of $89,418.37. (R. 28.)

The overpayment of excess profits tax for 1942 was the product of carrybacks of unused excess profits credits from 1943 and 1944. (R. 29.)

Although the net deficiency was only $89,418.37, the Commissioner calculated interest on the gross total deficiency of $338,145.04 from the various due dates in 1943,

1944, 1945 and 1946, respectively, until July 28, 1949, (the date the refund claim was filed), and calculated interest on the net deficiency only from July 28, 1949 until assessment. (R. 30.) Petitioner paid the interest as calculated by the Commissioner, and filed a timely refund claim for the difference between interest on the gross deficiency and interest on the net deficiency, netting the overpayments against the deficiencies at the time the overpayments arose but not retrospectively. (R. 27, 32.) Thus as petitioner computed the proper interest, the United States was entitled to interest on the deficiency for 1942 from March 15, 1943 until March 15, 1944, when the excess profits credit carryback arose which produced the partial offset, and only on the net deficiency thereafter. Under petitioner's computation the United States was not entitled to interest on the deficiency for 1943 because both it and the overpayment arose on March 15, 1944, nor on deficiency for 1944 to the extent offset by the overpayment because the latter arose before the former. So calculated, the correct interest exceeded that assessed and paid by $34,118.38, the amount of the refund claim in issue. (R. 32.)

ARGUMENT

REASONS FOR ALLOWANCE OF THE WRIT

1. This case presents the question whether *American Propeller Co. v. United States*, 300 U.S. 475, 57 S. Ct. 521, 87 L. Ed. 751 (1937), is still authoritative and binding on the lower courts. It was unanimously decided. It has never been expressly overruled by this Court nor has this Court ever spoken of it as a doubtful authority.

It was cited as authoritative and applied by the Court of Claims as recently as 1958. *Wire Corp. v. United States*, 166 F. Supp. 744, 750 (1958).

The court below did not expressly refuse to follow this Court's *American Propeller* decision. In its original opinion the court below distinguished it on a ground that the court abandoned in its opinion denying the rehearing, where *American Propeller* was not mentioned. Thus the *American Propeller* case was not followed by the court below although it is not distinguished, or distinguishable.

In both *American Propeller* and this case the taxpayer had a valid but non-interest-bearing claim against the United States. In both *American Propeller* and this case the taxpayer owed an interest-bearing tax deficiency to the Government. In *American Propeller* this Court held that the Government could not collect interest on the deficiency while it held offsetting moneys due the taxpayer, even if the offset was itself non-interest-bearing. In the instant case the court below held the precise opposite.

In its original opinion, the court below distinguished *American Propeller* on the ground that (Appendix p. xvii):

> "In American Propellor (sic) Co. both obligations were owing 'at the same time' in 1924. *Here there was no obligation owing from the United States on the date of the claimed offset.*" (Emphasis ours.)

In our petition for rehearing we pointed out that the italicized statement was wrong; that the obligation to make refunds attributable to carrybacks arises automatically when the ususued credit arises, unlike Sec. 722 refunds which depend on discretionary administrative

action; that the right to receive a refund does not depend on the filing of a claim, although the right to sue does depend on it; and that thousands of administrative refunds are made annually without refund claims having been filed. The court below then said (Appendix pp. xxi, xxiii):

> "It is true, of course, that Section 3771(c) does not determine substantive rights to a refund. It does determine when interest on an overpayment shall begin. . . .
>
> "We do not hold that the substantive right to a refund arises only when procedural requirements are met."

Thus the court backed away from its prior basis for distinguishing the *American Propeller* case. It offered a new basis for decision which does not distinguish that case (Appendix pp. xxi, xxiii):

> "This court may not decide the questions of offset and interest on equitable grounds contrary to the statutory provisions. . . . Nor does any applicable statute provide for a netting of principal amounts before interest is computed."

The court below thus denies that equitable considerations have a bearing on the problem, and instead asserts that our position must fail unless it has express statutory support.[1]

[1]There is not, and we do not expect respondent to assert the contrary, any statute expressly pro or con on this issue. There are statutes in which implications appear, both helpful and hurtful to our case. As nearly express as any statutory reference is the one on which we rely, in Section 292(a), the section which is

This Court's unanimous decision in *American Propeller* is to the exact contrary. There was no statutory basis for the result there reached. On the contrary, the result reached was contrary to the literal implications of the statutes, which made the Government's claim for taxes an interest-bearing debt and made the taxpayer's claim on contract a non-interest-bearing debt. In holding that the two debts should be netted and that interest could not run on the Government's tax claim while it owed the taxpayer a larger non-interest-bearing debt on contract, this Court stated the ground of decision as follows (300 U.S. 475, 478):

> "... The inequity of allowing the Government interest for 12 years under these circumstances. . . . is so gross as to be shocking. . . .
>
> "... . If the principle thus stated is not strictly applicable, it at least suggests that the court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law."

If there was not "plain compulsion of law" in *American Propeller*, then neither was there in the instant case, for the statutory setting is entirely similar. This Court's decision to the contrary has therefore not been followed, and the basis of its decision has apparently been regarded as not binding on the Court of Appeals.

Until this Court overrules its *American Propeller* decision the lower courts should follow it. Certiorari should

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the source of the Government's right to charge interest on deficiencies. It contains this provision: "If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion."

be granted in order that this Court may decide whether its decision need no longer be followed.[2]

2. This case presents the question whether later decisions of this Court have overruled *American Propeller Co. v. United States*, 300 U.S. 475, 57 S. Ct. 521, 81 L. Ed. 751 (1937), or have so impaired its validity that it should now be formally overruled.

The unanimous decision of this Court in *American Propeller* held the Government could not collect interest on an ordinarily interest-bearing tax deficiency where it simultaneously owed a non-interest-bearing debt *ex contractu* to the taxpayer. The court below refused to apply *American Propeller*, instead relying entirely on two later decisions of this Court[3] which are more readily distinguishable than *American Propeller*.

Neither of those cases refers to *American Propeller*, so neither case either approves or disapproves it. However,

[2]It is true here, as it was in *Bulova Watch Co. v. United States*, 365 U.S. 753, 81 S.Ct. 865, 6 L. Ed. 2d 72 (1961), that the actual result reached below would not obtain under the 1954 Code. This circumstance did not prevent this Court's accepting the *Bulova Watch* case for review, and it should not do so here. The instant case presents an issue which still can arise in other circumstances: an overpayment in advance payment of tax or withheld tax carries no interest before the due date of the return (Sec. 6611(d), 1954 Code), so *quaere* if it is credited against a deficiency for another year; a refund of estate tax attributable to the credit for state or foreign death taxes bears no interest (Section 2011(e), 2014(e), 1954 Code), so *quaere* if it is credited against an income tax deficiency of the decedent or his estate; and the situation presented in *American Propeller* can still present the issue. Sections 6412, 6413(d), 6416(b), 6419(b), 6420(a) and 6421(a), 1954 Code, all provide for refunds without interest, any of which, if credited against interest-bearing deficiencies, can present this problem.

[3]*Bulova Watch Co. v. United States*, 365 U.S. 753, 81 S. Ct. 864, 6 L. Ed. 2d 72, and *Manning v. Seeley Tube & Box Co.*, 338 U.S. 561, 70 S. Ct. 386, 94 L. Ed. 346.

we should believe that subsequent approval of a prior decision is not necessary to give it continuing validity; on the contrary, we should suppose that a Supreme Court decision continues to be a valid precedent until overruled by this Court, or by legislation.

Nor is the result in either case inconsistent with *American Propeller*. The *Bulova Watch* case,[4] the later of the two, involved no question of the netting of countervailing claims to stop interest. What it involved was the question whether the prohibition of Section 3771(e) on interest being paid on a refund arising from carrybacks for the period before a refund claim was filed applied to judgment refunds as well as to administrative refunds. No question of equitable principles modifying statutory implications was involved. The question involved was which of two statutes applied.

The earlier of the cases, *Manning v. Seeley Tube & Box Co.*,[5] approaches but does not reach the present issue. There the taxpayer sought to give retrospective effect to a carryback, to offset a deficiency and eliminate interest on it for a period before the carryback arose. We admit that the Government is entitled to interest on its deficiencies for that period, and our refund claim does not ask for refund of the interest collected for that period.

Conversely, neither the issue here presented nor that presented in *American Propeller* was present in *Seeley Tube*. In that case the deficiency interest not only was entirely for a period before the carryback arose but had

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[4]Supra, note 3.

[5]Supra, note 3.

actually been assessed before the carryback arose. The carryback arose on March 3, 1944, but the deficiency interest had been assessed by the Commissioner of Internal Revenue on August 2, 1943, and was for the period December 15, 1941—August 2, 1943. In holding that interest was not eliminated retroactively by a carryback arising thereafter, this Court expressed no view about the accumulation of deficiency interest accumulating after the offsetting carryback arose.

If, in *Seeley Tube*, the question had been whether deficiency interest continued to accumulate after March 3, 1944, when the offsetting carryback arose from the filing of the return showing the loss, then the question presented here would have been involved there. That question was not involved, however.[6]

3. This case presents an important question of federal law: the question whether equitable principles will modify the implications of statutory language only where the Government is the beneficiary of the equity, and not where the taxpayer seeks its benefit.[7]

In the past the roles have been reversed, and rigid application of statutory language would have produced a result corresponding to that reached below, but with the Government on the short end. The statutes then provided that interest on overpayments ran in the taxpayer's favor from the date the overpayment was made, but in-

[6]The court below did not cite *United States v. Koppers Company*, 348 U.S. 254, 75 S. Ct. 268, 99 L. Ed. 302 (1955), holding that a Sec. 722 refund cannot net out a deficiency for the purpose of computing interest until the right to the refund arises. This case is distinguishable, as the court below apparently recognized. The *Koppers* opinion did not mention *American Propeller*.

[7]For the importance of the issue, see footnote 2, supra.

terest on deficiencies ran in the Government's favor only from the date the deficiency was assessed. Cases arose in which an unassessed deficiency and an overpayment existed during the same period. The courts could have made arguments of declared Congressional policy similar to those made by the court below, but instead the non-interest-bearing debt and the interest-bearing counter-claim were netted to the Government's advantage. *Lucas v. United States ex rel. Blackstone Mfg. Co.*, 45 F. 2d 291, (C.A. Dist. Col., 1930); *McCarl v. United States ex rel. Leland*, 42 F. 2d 346 (C.A. Dist. Col., 1930), cert. den. 282 U.S. 839; *Standard Oil Co. v. United States*, 5 F. Supp. 976, 986 (Ct. Cl., 1934), cert. den. 293 U.S. 599; *United States v. Pacific Midway Oil Co.* not officially reported but found in 15 A.F.T.R. 740 (N.D. Cal., 1932); *Tull & Gibbs, Inc. v. United States*, 48 F. 2d 148, 150 (C.A. 9, 1931); *Noyes v. United States*, 55 F. 2d 870, (C.A. 9, 1932). It will be observed that two of these decisions were by the court below.

This Court did not believe this principle was one only the Government could invoke when it decided *American Propeller & Mfg. Co. v. United States*, 300 U.S. 475, 57 S. Ct. 521, 81 L. Ed. 751 (1937), discussed above. The court below appears to believe that the decision in *Manning v. Seeley Tube & Box Co.*, 388 U.S. 561, 70 S. Ct. 386, 94 L. Ed. 346 (1950) signifies a reversal of this Court's position. As we have demonstrated above, the *Seeley* case has not overruled *American Propeller*, either expressly or *sub silentio*.

This Court should review this case as an opportunity to declare that the equitable principles which were found

controlling when invoked by the Government have not ceased to be available to the taxpayer as well.

4. An important question of federal law is presented which apparently has grown obscure with time and requires restatement. That question is whether a federal statute, in this case Section 292(a) of the 1939 Internal Revenue Code, is to be given application only in the circumstance which caused Congress to adopt it, or is to be applied generally according to its terms.

The statutory language involved is a sentence added to Section 292(a) by the Individual Income Tax Act of 1944. Section 292(a) was the source of the Government's authority to collect interest on tax deficiencies. The sentence in question provided:

> "If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion."

It is quite clear factually that here there was a "prior satisfaction" of the deficiency, for what occurred eliminated the obligation to pay it. The statute's terms do not limit it to "prior payment" but use the more comprehensive term "prior satisfaction".

The court below (Appendix p. xiv) has confined the effect of this language to the circumstances which led to its enactment.[5] In this, its decision conflicts with that of the Court of Appeals for the Seventh Circuit in *Starr v. Commissioner*, 267 F. 2d 148, 151, which held that a

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[5] Current payments of estimated tax were specifically what caused Congress to act.

deposit in a suspense account against disputed taxes was a "prior satisfaction" to which the statute applied.

It was thought settled after the decision in *Caminetti v. United States*, 238 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917) that the full import of clear statutory language must be given effect even though the legislative history of the statute shows that Congress' concern was much more limited. So much emphasis has been placed in recent years on the use of legislative history in interpreting statutes that its proper function appears to have become blurred, as evidenced by the action of the court below in holding that the statutory language was no help to petitioner because the legislative history showed it was enacted to help another class of taxpayers.

CONCLUSION

The writ of certiorari should be issued.

Dated, San Francisco, California,
April 16, 1962.

Respectfully submitted,

VALENTINE BROOKES,
PAUL E. ANDERSON,
Attorneys for Petitioner.

(Appendix Follows.)

Appendix.

SEC. 292. INTEREST ON DEFICIENCIES.

(a) General Rule—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272 (d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion.

(c) DEFICIENCY RESULTING FROM CARRY-BACK AND RELATED MATTERS.—If any part of a deficiency is determined by the Commissioner to be attributable (A) to a carry back to which an overpayment described in section 3771 (c), or a decrease determined under section 3780 (b), in any other tax is attributable, or (B) to an error in the amount or effect of a carry-back which resulted in a credit or refund of an overpayment with interest computed pursuant to section 3771 (c), or in a decrease determined under section 3780 (b), no interest shall be assessed or paid under subsection (a) with respect to such part of the deficiency for any period during which

interest was not allowed with respect to such overpayment or for a period prior to the application of such decrease.

SEC. 322. REFUNDS AND CREDITS.

(a) AUTHORIZATION—

(1) OVERPAYMENT.—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

SEC. 3771. INTEREST ON OVERPAYMENTS.

(e) CLAIMS BASED ON CARRY-BACK OF LOSS OR CREDIT.—If the Commissioner determines that any part of an overpayment is attributable to the inclusion in computing the net operating loss deduction for the taxable year of any part of the net operating loss for a succeeding taxable year or to the inclusion in computing the unused excess profits credit adjustment for the taxable year of any part of the unused excess profits credit for a succeeding taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period before the filing of a claim for credit or refund of such part of the overpayment or the filing of a petition with the Board, whichever is earlier; nor for any period beginning with the date of filing of an application under section 3780 (a) relating to such part of the overpayment and ending with the last date the Commissioner's determination is required to be made under section 3870 (b); nor, in case an application is made under section 3780 (a), for any period

before the first day of the month immediately following the month in which falls the last date prescribed by law (including any extension of time granted the taxpayer) for filing the return for the taxable year of the net operating loss or unused excess profits credit, or before the date on which the return is filed, whichever is later.

United States Court of Appeals
for the Ninth Circuit

United States of America, Appellant, vs. Hecla Mining Company, a corporation, Appellee.	No. 17,064 Nov. 14, 1961

On Appeal from the Judgment of the United States District Court for the District of Idaho

Before: HAMLEY and KOELSCH, Circuit Judges, and JAMESON, District Judge

JAMESON, District Judge:

Appellee taxpayer seeks recovery of interest in the amount of $34,118.38 assessed and paid with respect to corporate income tax deficiencies for the years 1942 to 1945 inclusive. The question presented is whether interest on income tax deficiencies and interest on an excess profits tax overassessment should be computed separately, as appellant contends, or the amounts of the deficiencies and overassessment offset against each other and the interest computed on the resulting net amount, as appellee contends, and as the district court held.

The facts are undisputed. On February 19, 1946, taxpayer filed a claim for refund of 1942 excess profits taxes, and on July 28, 1949, filed an amended claim, based upon

a carry-back to 1942 of unused excess profits credits for the taxable years 1943 and 1944. The revenue agent, who audited taxpayer's income and excess profits tax returns for the years 1942 to 1945 inclusive, filed his report on July 18, 1949, finding deficiencies in income taxes for each of the four years and large unused excess profits credits for the years 1943 and 1944.

Following negotiations, the Internal Revenue Service and taxpayer on December 12, 1952, agreed upon the amounts of the income and excess profits tax liabilities as follows:

Year	Income Tax Deficiencies	Excess Profits Tax Overpayment	Net Amount Owing
1942	$122,498.66	($276,362.86)	($153,864.20)
1943	16,930.00		16,930.00
1944	89,166.02		89,166.02
1945	109,550.36		109,550.36
	$338,145.04	($276,362.86)	$ 61,782.18
Post War Credit Reduction			27,636.29
			$ 89,418.37

Interest on income and excess profits tax deficiencies were assessed against appellee as follows:

Year	Deficiency Per Books	Interest Assessed	Delinquency Interest	Total Interest
1942 IT	$122,498.66	$ 25,085.33[1]	$ 271.42	
1942 EPT	57,460.01	3,447.60[1]	37.30	
1943 IT	16,930.00	8,971.74	97.07	
1944 IT	89,166.02	41,901.92	454.38	
1945 IT	109,550.36	44,908.14	485.90	
		$124,314.73	$1,346.07	$125,660.80

Interest on the overassessment of excess profits tax was computed by the Commissioner as follows:

		Interest From	Interest To	Amount Interest
Overassessment	$276,362.86			
Post War Credit-Reduction	27,636.29	7/28/49	12/31/45	None
Remainder	248,726.57			
Interest on	245,278.97	7/28/49	1/14/53	$50,967.62
Interest on	3,447.60	7/28/49	5/ 1/53	777.41[2]
			Total	$51,745.03

The interest of $51,745.03 was computed pursuant to Section 3771(e) of the Internal Revenue Code of 1939;[3]

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[1]Interest (with minor adjustments) was computed on the 1942 income and excess profits tax deficiencies from July 28, 1949, the date the claim for unused excess profits credits was filed.

[2]July 28, 1949, was the date the claim for carry-back was filed; January 14, 1953, the 30th day after waiver; and May 1, 1953, the date of assessment of deficiency interest against which this amount was credited.

[3]Internal Revenue Code of 1939: § 3771 Interest on Overpayments. "(e) (as added by § 153(d), Revenue Act of 1942, c. 619,

the interest on the income tax deficiencies for 1943, 1944 and 1945, pursuant to section 292(a);[4] and the interest on the 1942 income tax deficiency pursuant to section 292(c).[5]

On June 25, 1953, taxpayer received a check from the United States for $51,745.03. On July 7, 1953, taxpayer paid the United States the sum of $89,418.37, representing the net amount of the principal owing, and on July

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56 Stat. 798, 847) *Claims Based on Carry-Back of Loss or Credit.*—If the Commissioner determines that any part of an overpayment is attributable to the inclusion in computing the net operating loss deduction for the taxable year of any part of the net operating loss for a succeeding taxable year or to the inclusion in computing the unused excess profits credit adjustment for the taxable year of any part of the unused excess profits credit for a succeeding taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period before the filing of a claim for credit or refund of such part of the overpayment or the filing of a petition with the Tax Court, whichever is earlier."

[4]Section 292(a) (as amended) provides in pertinent part that, "Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the Collector, and shall be collected as a part of the tax * * * from the date prescribed for the payment of the tax * * * to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion." (26 U.S.C. 1952 Ed. § 292).

[5]Section 292(c) (as added by Section 6(a) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517) provides in pertinent part that, "If any part of a deficiency is determined by the Commissioner to be attributable (A) to a carry-back to which an overpayment described in section 3771(c) * * * or (B) to an error in the amount or effect of a carry-back which resulted in a credit or refund of an overpayment with interest computed pursuant to section 3771(c) * * * no interest shall be assessed or paid under subsection (a) with respect to such part of the deficiency for any period during which interest was not allowed with respect to such overpayment * * *." (26 U.S.C. 1952 Ed. § 292)

29, 1953, paid $125,660.80, interest. Of this amount, $34,118.38 is in dispute, computed as follows:

Interest paid by taxpayer on deficiencies	$125,660.80
Interest paid to taxpayer on overassessment	51,745.03
	$ 73,915.77
Interest on $89,418.39	39,797.39
Amount in dispute	$ 34,118.38

Appellee has conceded its liability for interest upon the deficiency in excess profits taxes arising from standard issue adjustments for 1942 from the due date of the 1942 return (March 15, 1943) to the due date of the 1943 return (March 15, 1944), when the unused excess profits credit for the taxable year 1943 arose. Appellant has not sought to collect interest upon the 1942 excess profits tax deficiency based on standard issue adjustments for any period after March 15, 1944. The trial court held that the Commissioner erroneously failed to permit offset of the overassessment of excess profits tax against the income tax deficiencies for 1943, 1944 and 1945 as of the due dates thereof. Had he done so, the amount of interest would have been reduced by $34,118.38. Judgment was entered for that amount.

The question of whether the offset was properly permitted in the computation of interest depends primarily upon when the excess profits tax overassessment for 1942 came into existence and was available for use as an offset. The trial court found that the offsetting overpayments arose on the dates the returns were filed reporting unused excess profits credits to be carried back to 1942 "to pro-

duce the overpayment in excess profits tax for that year". Appellee accordingly contends that this resulted in a "credit" with the Government, which was available when the income tax deficiencies came into being.

Appellant contends that the excess profits tax overassessment did not come into existence retroactively to the dates of the returns, and that in permitting the offset in the computation of interest, the trial court (a) failed to give effect to the specific provision of section 3771(e) (Footnote 3), prohibiting the allowance of interest, on excess profits tax overassessment attributable to unused excess profits credit carry-backs, for any period prior to the filing of the claim asserting the carry-back, and (b) failed to give effect to the provisions of section 292(a) and 292(c) with respect to the allowance of interest on income tax deficiencies under the circumstances of this case.

Under Section 3770(a)(3) of the Internal Revenue Code of 1939 the date of allowance of a refund or credit is the date the Commissioner signs the schedule of overassessment. The schedule of overassessment of the 1942 excess profits tax in this case was signed May 1, 1953, although the credit for the assessment was made available as of January 14, 1953, the 30th day after the filing of the assessment.

Section 3771 deals with "Interest on Overpayments". It provides generally that interest shall be allowed and paid from the "date of overpayment"; but § 3771(e) specifically provides that, "If the Commissioner determines that any part of an overpayment is attributable to * * *

(an) unused excess profits credit for a succeeding taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period before the filing of a claim for credit or refund * * *". This section is a part of the Revenue Act of 1942, which authorized carry-backs "to ameliorate the unduly drastic consequences of taxing income strictly on an annual basis" and to permit a "taxpayer to set off its lean years against its lush years, and to strike something like an average taxable year". Libson Shops, Inc. v. Koehler, 1957, 353 U.S. 382, 386, 77 S.Ct. 990, 1 L.Ed.2d 924.

After referring to a carry-back as "an exceptional relief measure in that it permits a departure from the basic annual accounting rule", the Supreme Court in Bulova Watch Co. v. United States, 1961, 365 U.S. 753, 759, 81 S.Ct. 864, 6 L.Ed.2d 72, said:

> "The significant feature of a carry-back is that it permits an adjustment of an earlier liability upon the basis of subsequent events. It contemplates that the initial tax obligation was not incorrectly or mistakenly imposed but was actually due, but that an adjustment may be made upon the basis of the taxpayer's gain or loss in the succeeding year or years, and it is evident from the very terms of § 3771(c) that Congress thought it would be unfair to the Government to require it to pay interest on a claim brought about by such a retroactive adjustment prior to the time when the taxpayer took affirmative steps to bring home to the Commissioner that he is now in position to claim, and claims, a readjustment of his past admittedly correct tax liability. Section 3771(c) does not, of course, deny interest on carry-back refunds. It only prohibits the accrual of interest prior

to the time the taxpayer's claim therefor is filed with, and thus made known to, the Commissioner."[6]

Appellee contends, however, that it is not seeking to obtain interest on an overpayment contrary to §3771(e) but rather is questioning appellant's right to "collect interest on a phantom deficiency". It is conceded that if appellee sought to recover interest upon the overpayment, §3771(e) would deny interest for any period prior to July 28, 1949. It is argued that this section does not "prevent the overpayment of the tax itself being offset against another deficiency in tax in such manner as to prevent the other deficiency from accruing interest".

It is true, as appellee contends, that Bulova Watch did not deal with offsets. It is pertinent, however, in determining when the overpayment became available as an offset. The only logical conclusion to draw from §3771(e), as construed by the Supreme Court in Bulova Watch, is that the overpayment did not become available as an offset until the taxpayer filed his claim for refund. Until the carry-back was allowed, there was no obligation owing from the Government since the excess profits tax was lawfully and correctly assessed. The obligation arose by reason of an adjustment and carry-back of the overpayment in subsequent years, and no overpayment may be deemed

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[6]The opinion quotes from the report of the Senate Finance Committee on the bill which became §3771(e) (S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 123-4) as showing "Congress' purpose to deny interest on carry-back refunds for any period prior to the time they could be determined, and also to prevent, through delay in the presentation of claims, the accumulation of interest after that date and prior to the filing of the claim".

made until the time designated for the accrual of interest through the filing of the claim.[7]

This conclusion was implicitly recognized in Manning v. Seeley Tube & Box Co., 1950, 338 U.S. 561, 70 S.Ct. 386, 94 L.Ed. 346. In that case the Commissioner had assessed deficiencies in the 1941 taxes of a corporate taxpayer, with interest from the date the tax was properly due to the assessment date. In 1944 the taxpayer filed its return for the fiscal period from October 1, 1942, to September 30, 1943, showing a net operating loss for that year. This loss when carried back was sufficient to abate entirely the corporation's tax liability for 1941. The taxpayer filed claims for a refund of part of the 1941 tax which had been paid and for abatement of the assessed deficiency and interest. The Commissioner abated the deficiency but refused to refund all that had been paid, retaining an amount equal to the interest which had been assessed on the deficiency. The corporation then sued the Collector for that interest. In holding that the interest was properly withheld by the Collector, the Court said:

> ... The subsequent cancellation of the duty to pay this assessed deficiency does not cancel in like manner the duty to pay the interest on that deficiency. From the date the original return was to be filed until the date the deficiency was actually assessed, the taxpayer had a positive obligation to the United States: a duty to pay its tax. (Citing cases.) For that period

[7] Under the 1954 Code the overpayment resulting in a carry-back is "deemed not to have been made prior to the close of the taxable year" giving rise to the carry-back. Int. Rev. Code of 1954 § 6611(f). As the Supreme Court observed in Bulova Watch, this provision was clearly a change from existing law and was so recognized by Congress in the relevant committee report, H. R. No. 1337, 83d Cong., 2d Sess., p. A418. (365 U.S. at p. 761)

the taxpayer, by its failure to pay the taxes owed, had the use of funds which rightfully should have been in the possession of the United States. *The fact that the statute permits the taxpayer subsequently to avoid the payment of that debt in no way indicates that the taxpayer is to derive the benefits of the funds for the intervening period.* In the absence of a clear legislative expression to the contrary, the question of who properly should possess the right of use of the money owed the Government for the period it is owed must be answered in favor of the Government." (Emphasis supplied.)

It is clear from this decision that the obligation to the taxpayer did not arise by reason of the operating loss in itself. Through statutory procedures a validly assessed deficiency was subsequently abated by the carry-back of the loss. We can see no logical or valid distinction between the subsequent *avoidance* of the debt of the taxpayer through carry-back of an operating loss, and a subsequent *reduction* in the debt of the taxpayer through application of an overpayment. In either event the obligation is not owing or available as an offset until the right to interest is perfected through filing the claim for refund.

Manning v. Seeley Tube & Box Co. also recognized that the abatement of interest would "place a premium on failure to conform diligently with the law". The Court continued: "For then a taxpayer who did not pay his taxes on time would receive the full use of the tax funds for the intervening period, while the taxpayer who did obey the statutory mandate and pay his lawful taxes promptly would be prohibited by § 3771(c) from having the use of the money for that period. We cannot approve

such a result." (338 U.S. at 568.) So here, the taxpayer who underpaid his taxes, with a resulting deficiency, would enjoy an advantage over the taxpayer who paid the correct amount.

Appellee also relies upon the 1944 amendment to section 292(a) providing that, "If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion." The "prior satisfaction" referred to in this amendment is a prior satisfaction of "the tax", i.e. the tax liability for the particular year with respect to which interest on a deficiency is authorized.

This amendment was added in 1944 following the enactment of the Current Tax Payment Act of 1943 (c. 120, 57 Stat. 126) providing for estimated tax payments and tax withholding at the source of wages.[8] It was recognized that "under the system of tax collection which now obtains with respect to individuals, it is apparent that in certain cases the estimated tax payment and the tax withheld at the source may exceed the tax shown by the taxpayer upon his return".[9] The addition of the last sentence in section 292(a) was specifically explained in the Senate Report as follows:

> "Subsection (c) of section 44 amends code section 292(a), relating to interest on deficiencies, to expressly provide that if any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper

[8] See discussion of this amendment in S. Rep. No. 885, 78th Cong., 2d Sess., pp. 37-41 (1944 Cum. Bull., 858, 887-889).

[9] S. Rep. No. 885, supra, p. 38 (1944 Cum. Bull., 887).

adjustment shall be made with respect to the interest on such portion for the period subsequent to the proper payment thereof. This amendment is necessitated by the change in the system of tax collection as the result of which there may be an assessment of a deficiency even though the full amount of the tax has already been collected."[10]

The carry-back to 1942 of unused excess profits credits does not constitute a "prior satisfaction" of 1943, 1944 and 1945 income tax deficiencies, within the meaning of § 292(a).[11]

As noted supra, the interest on the income tax deficiency for 1942 was computed from the date the amended claim was filed, pursuant to § 292(c).[11] This section, added by the Tax Adjustment Act of 1945, specifically provides that in the case of a deficiency resulting from an overpayment attributable to an unused excess profits carry-back, no interest shall be allowed "with respect to such part of the deficiency for any period during which interest was not allowed with respect to such overpayment".[12]

It is clear from the legislative history of the bill which became the Tax Ajustment Act of 1945 that it was the intent of Congress, with respect to any *deficiency attributable to overpayments resulting from carry-backs*, to eliminate interest for any period during which interest was

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[10]S. Rep. No. 885, supra, p. 41 (1944 Cum. Bull., 889).

[11]See Footnote 5.

[12]Here the 1942 income tax deficiency was attributable to the excess profits tax overpayment resulting from the carry-backs. The income tax deficiencies for 1943, 1944 and 1945 were not attributable to the carry-backs, but arose by reason of "standard issue" adjustments, unrelated to any carry-back.

not allowed for the overpayments under § 3771(e).[13] The application of the amendment clearly is limited to deficiencies attributable to overpayments resulting from carry-backs and may not be extended to income tax deficiencies resulting from "standard issue" adjustments not related to the carry-backs.

If appellee were correct in its contention that the overassessment of the excess profits tax could be offset against income tax deficiencies for all prior years, the amendment incorporated in § 292(c) would have been unnecessary. We cannot assume that Congress did a useless act. The fact that Congress saw fit to enact this amendment confirms our conclusion that there may be no offset in the computation of interest.

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[13] H. Rep. No. 849, 79th Cong., 1st Sess., pp. 33-35 (1945 Cum. Bull., pp. 566, 588-589) on H. R. 3633, which became the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517, reads in part:

"Under present law interest on an overpayment attributable to a net operating loss carry-back or to an unused excess profits credit carry-back may be allowed only from the date of the filing of a claim for credit or refund of such overpayment or from the date of the filing of a petition with The Tax Court, whichever is earlier. Overpayments in one tax, however, frequently result in deficiencies in another tax. Thus, an overpayment of excess profits tax generally results in a deficiency in income tax. Interest on such deficiency, under present law, is payable from the date prescribed for the payment of the tax or, if the tax is paid in installments, from the date prescribed for the payment of the first installment.

* * *

"To correct the above situation, subsection (a) of section 6 of the bill adds a new subsection (c) to section 292 of the Internal Revenue Code. Such new subsection (c) provides that if any part of a deficiency in tax results from an overpayment or a decrease, attributable to a net operating loss carry-back or to an unused excess profits credit carry-back, in any other tax, no interest shall be assessed or paid with respect to such part of the deficiency for any period during which interest was not allowed with respect to such overpayment or decrease."

The cases upon which appellee relies are distinguishable. In all of them there was a definite obligation owing from the United States at the time of the claimed offset, or a deposit of funds upon which interest would be allowed. None of them involve a statutory provision such as § 3771(e), expressly prohibiting the allowance of interest for any period prior to the filing of the claim asserting the carry-back.

Appellee argues that American Propellor Co. v. United States, 1937, 300 U.S. 475, 57 S.Ct. 521, 81 L.Ed. 751, is controlling. In that case the plaintiff instituted suit in the Court of Claims to recover an amount due from the Government under certain contracts. The Government counterclaimed for a deficiency income and excess profits tax assessment. The Supreme Court pointed out that under the findings the Government was indebted in 1924 to petitioner in the sum of $119,413.04, against which there was at the same time a just counterclaim of $82,701.29, "so that if the account had been adjusted at that time instead of 12 years later, the Government would have been obliged to pay petitioner the difference between these two sums, or $36,711.75". It was held that the inequity of allowing the Government interest for 12 years thereafter so as to bring the claimant in debt to the Government in the sum of over $21,000.00 was so gross as to be shocking.

In American Propellor Co. both obligations were owing "at the same time" in 1924. Here there was no obligation owing from the United States on the date of the claimed offset. Nor did the subsequent obligation arise by reason of an incorrect or mistakenly imposed tax, but

solely by reason of a retroactive adjustment permitted by statute, and with a specific statutory provision that interest should not be paid before the filing of the claim. The overpayment did not come into existence as an obligation of the United States for interest purposes until the amended claim was filed on July 28, 1949.

Judgment reversed.

(Endorsed) Opinion Filed Nov. 14, 1961.

Frank H. Schmid, Clerk.

United States Court of Appeals
for the Ninth Circuit

United States of America, Appellant, vs. Hecla Mining Company, a corporation, Appellee.	No. 17,064 Jan. 31, 1962

On Petition of Appellee for Rehearing

Before: HAMLEY and KOELSCH, Circuit Judges, and JAMESON, District Judge

JAMESON, District Judge:

Appellee has filed a petition for rehearing. While we have concluded that the court reached the correct result in its original opinion and that the petition should be denied, we do deem some modification and clarification of the opinion advisable.

Appellee contends that it became entitled to the overpayment as a matter of *substantive* right when the taxable years ended with an unused credit in existence and that accordingly the overpayment at that time became available as an offsetting obligation; that section 3771(e) relates only to the date when *interest* begins running and does not determine when the substantive right to the refund arose; and that in cases in which the Government occupied the position of appellee here, the "Government

was rescued by sympathetic courts from the inequity of the statutes".

Appellee relies upon cases[1] arising under the Internal Revenue Act of 1926,[2] contending that the statutory framework then existing was the exact converse of that involved here. Interest on deficiencies ran from the date of assessment, whereas interest on refunds ran from the date of overpayment. Cases arose where the taxpayer was entitled to a refund over a certain period for which there was an unassessed deficiency. It was held that the deficiency must be offset against the overpayment, and interest was allowed the taxpayer only on the net balance. In effect a tax deficiency was allowed as a set-off as of the due date of the tax return, notwithstanding the statutory interest provisions.

We cannot agree with appellee that this case presents the exact converse of that situation. The Commissioner, asserting a tax deficiency under the Internal Revenue Act of 1926, was not in the position of appellee, claiming an overpayment by reason of carry-back provisions of

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[1]McCarl v. United States, D.C. Cir. 1930, 42 F.2d 346; Huwe v. Ohmer Fare Register Co., 6 Cir. 1932, 61 F.2d 721; Lucas v. United States, D.C. Cir. 1930, 45 F.2d 291; Standard Oil Co. v. United States, Ct.Cl. 1934, 5 F.Supp. 976, 987; and Tull & Gibbs v. United States, 9 Cir. 1931, 48 F.2d 148.

[2]The cases deal generally with controversies under Section 284(a), Internal Revenue Act of 1926 (44 Stat. 66) which provided:

> "Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act * * * the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer."

the 1939 Internal Revenue Code. Deficiencies assessed under the 1926 Act were for taxes regularly due and imposed for particular years, unaffected by subsequent and antecedent years. A taxpayer presumed familiar with the law and held accountable to its provisions could be expected to know that a deficiency existed. The overpayments referred to in section 284(a), supra, were those which arose by reason of taxes erroneously or illegally assessed and consequently bore interest from the date the tax was overpaid.[3]

A carry-back does not arise by reason of an erroneous assessment or illegally collected tax. "An exceptional relief measure", it permits "an adjustment of an earlier liability upon the basis of subsequent events".[4] Unlike the deficiencies existing under the Internal Revenue Act of 1926, the Government cannot be presumed to know of the existence of overpayments due to carry-back of unused excess profits credits, made possible by circumstances peculiarly within the knowledge of the taxpayer, until such time as appropriate steps are taken to bring the overpayment to the attention of the Commissioner. Hence, the interest provision embodied in section 3771(c) has more significance than that relating to tax deficiencies under the Internal Revenue Act of 1926.

It is true, of course, that section 3771(c) does not determine substantive rights to a refund. It does determine when interest on an overpayment shall begin. This court may not decide the questions of offset and interest on

[3]Section 1116, Internal Revenue Act of 1926.

[4]Bulova Watch Co. v. United States, 1961, 365 U.S. 753, 759, 81 S.Ct. 864, 6 L.Ed.2d 72.

equitable grounds contrary to the statutory provisions. In determining a comparable interest question in Babcock & Wilcox Co. v. Pedrick, 2 Cir. 1954, 212 F.2d 645, the court pointed out that equity alone is a "dangerous ground for the testing of taxes". The court continued: "'The Internal Revenue Code, not general equitable principle, is the mainspring of the Board's jurisdiction.' C.I.R. v. Gooch Milling & Elevator Co., 320 U.S. 418, 422, 64 S.Ct. 184, 186, 88 L.Ed. 139. And so we must turn to the statutes."

We are satisfied from a study of the applicable statutes and legislative history that the substantive right to claim a refund for an overpayment resulting from a carry-back is not accorded the status of an obligation which may be netted against deficiencies. "The excess profits tax and the ordinary income tax are not one, but are made and levied in separate and distinct manner. They are imposed by separate legislation separately enacted." Babcock & Wilcox Co. v. Pedrick, supra, 212 F.2d at 649. They cannot be treated as one tax for the purpose of computing interest. W. G. Duncan Coal Co. v. Glenn, D. Ky. 1952, 120 F.Supp. 948.

Section 3771(c) prohibits the allowance of interest on the overpayment for any period prior to the date of filing a refund claim (or petition with the Tax Court). Under section 292(a), interest upon the deficiency ran from the date prescribed for the payment of the tax to the date the deficiency was assessed. That these sections were meant to be applied literally and separately is confirmed by the Tax Adjustment Act of 1945 which added subsection (c) to section 292, discussed in our original opinion.

The relief afforded by section 292(c) is limited to any deficiency attributable to overpayment resulting from carry backs and may not be extended to income tax deficiencies resulting from "standard issue" adjustments not related to the carry-back. It does not provide for interest on overpayments prior to application for refund, but rather that interest shall not be allowed on the deficiency in a particular situation where an adjustment was deemed necessary. Nor does any applicable statute provide for a netting of principal amounts before interest is computed. The inference is inescapable that except in the situation governed by 292(c), section 292(a) is controlling with respect to interest on deficiencies, and section 3771 (c) is controlling with respect to interest on overpayments resulting from carry-backs. Section 292(c) is in effect a Congressional declaration and adjustment of the equities, leaving no room for discretion in this area.

We do not hold that the substantive right to a refund arises only when procedural requirements are met. We do hold that the interest provisions with respect to standard issue tax deficiencies and overpayments resulting from carry-backs of unused excess profits credits must be applied literally and separately to effect the result which Congress intended.

The original opinion is modified by this supplemental opinion, and the petition for rehearing is denied.

(Endorsed) Opinion on Rehearing Filed Jan. 31, 1962.

Frank H. Schmid, Clerk.

United States Court of Appeals
for the Ninth Circuit

United States of America, Appellant, vs. Hecla Mining Company, Appellee.	No. 17,064

JUDGMENT

Appeal from the United States District Court for the District of Idaho.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and Entered Nov. 14, 1961.